~~Brief~~ in Opposition to Certiorari

No. 87-1258

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE J. PLATSIS, Petitioner

v.

E.F. HUTTON & COMPANY INC., Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

Petitioner George Platsis, an attorney acting pro se, brought an action in state court which was removed to the United States District Court for the Western District of Michigan. In his Complaint, as amended, Petitioner asserted, inter alia, a cause of action based on alleged violations of Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)"), 15 U.S.C. §78j(b) and Securities and Exchange Commission Rule 10b-5 ("Rule 10b-5") promulgated thereunder. The alleged securities fraud was said to have arisen in connection with Petitioner's purchase of eleven interests in various oil and gas tax shelter limited partnerships ten of which Petitioner purchased through the Respondent brokerage house, E.F. Hutton & Company Inc. ("Hutton").

In order to state a cause of action under Section 10(b) and Rule 10b-5, a plaintiff must establish each of the following with respect to a security: that the defendant made a misrepresentation of a material fact or omitted to state a material fact which omission rendered an affirmative representation misleading; that plaintiff justifiably relied on the misrepresentation or omission of material fact; that the defendant acted with scienter in making the misrepresentation or omission of material fact; and that plaintiff suffered damages as a direct and proximate result of the misrepresentation or omission of material fact. Following a lengthy trial, the Honorable Douglas W. Hillman, Chief Judge, presiding, concluded that Petitioner had failed to meet his burden of proof with respect to materiality, reliance and scienter. Moreover, the District Court

affirmatively found that the alleged misrepresentations and omissions, if any, were not the direct and proximate cause of Petitioner's losses. The Court of Appeals for the Sixth Circuit affirmed the District Court's opinion.

The questions before this Court as presented by Petitioner appear to be whether, as a matter of law:

1. Petitioner was required to prove reasonable reliance upon alleged misrepresentations and omissions of material fact in order to recover under Rule 10b-5, including fraud-on-the-market.

2. The District Court and the Court of Appeals erred in applying the standard for reasonable or justified reliance set forth in Kennedy v. Josephthal & Co., 635 F. Supp. 399 (D. Mass. 1985), aff'd, 814 F.2d 789 (1st Cir. 1987), with regard to Petitioner's Rule 10b-5 claim.

3. The District Court erred in finding that:

(a) Information concerning the past performance of prior unrelated limited partnerships and "speculative projections" of the limited partnerships purchased by Petitioner was not material;

(b) The nondisclosure of information to investors concerning estimated oil and gas reserves and the present value of such estimated reserves, where such information is specifically exempted from disclosure to investors by Securities Exchange Commission accounting regulations, was not material and properly omitted from the offering memoranda;

(c) The oil and gas limited partnerships in question were

economically viable when offered to Petitioner;

(d) Petitioner's damages resulted from the precipitous decline in oil and gas prices and not as a result of alleged misrepresentations and omissions on the part of Respondent or the sponsors of the underlying investments.

Respondent contends that the threshold question before this Court is whether a writ of certiorari should be granted herein. Repondent believes that resolution of Petitioner's questions would not be dispositive of the case, that no important questions of federal law are presented and that there are no conflicts which need resolution. For the reasons asserted below, Respondent submits that Petitioner's Petition for an Order Granting a Writ of Certiorari should not be granted.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner George J. Platsis and the Respondent E.F. Hutton & Company Inc.

At all times during the pendency of the trial and initial appeal E.F. Hutton & Company Inc. was a wholly owned subsidiary of The E.F. Hutton Group Inc. E.F. Hutton & Company Inc. has since been acquired and merged into Shearson Lehman Hutton Inc.

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Respondent E.F. Hutton & Company Inc. respectfully requests this Court to deny the petition for writ of certiorari seeking review of the opinion of the Court of Appeals for the Sixth Circuit reported at 814 F.2d 798.

STATEMENT OF THE CASE

Petitioner is a well educated and intelligent attorney who has worked as a trial attorney for the Federal Trade Commission, the Michigan Department of Attorney General, Consumer Protection Division, and the Michigan Department of Transportation. Petitioner is currently in private practice, specializing in personal injury and medical malpractice litigation. Petitioner continues to assist in the defense of highway negligence and condemnation actions as a Special Assistant Attorney General for the State of Michigan.

As a result of several years' efforts in connection with the representation of a personal injury plaintiff, Petitioner received a contingent fee in the approximate amount of $500,000.00 in 1980. To reduce what he considered an "unfair" tax burden falling in one year, Petitioner

sought tax shelter investment advice from Hutton's Lansing, Michigan office.

From 1980 through 1982, Petitioner invested in eleven oil and gas limited partnerships. Hutton was the sales agent with respect to ten of Petitioner's tax shelter investments.

In response to disappointing returns on his oil and gas investments, Petitioner brought suit in Michigan state court which action was removed to the United States District Court for the Western District of Michigan. Petitioner sued Hutton for alleged misrepresentations and omissions made to Petitioner by Hutton and Hutton's account executive Joseph Potvin, in alleged violation of the federal securities laws, including Rule 10b-5, the Racketeer Influenced and Corrupt Organizations Act, various state laws and the common law.

The District Court, in an extensive opinion by Chief Judge Hillman, found that Petitioner had failed to satisfy his burden of proof with respect to each and every element of each cause of action.

On appeal, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court and specifically found that "[t]he district court opinion addresses each of plaintiff's claims and makes findings as to each from which he concluded that plaintiff has failed to carry his burden of proof." (Pet. 4a)

REASONS WHY THE PETITION SHOULD BE DENIED

The Questions Presented in the Petition are not dispositive of the action below and do not raise important questions of federal law. Indeed, the Questions Presented raise issues of fact, not law, and raise issues not raised or addressed by

the courts below in the manner asserted by Petitioner. Moreover, the decisions of the lower courts are not in conflict with decisions of this Court and there is no conflict among the Circuit Courts of Appeals.

I. THE QUESTIONS PRESENTED ARE NOT DISPOSITIVE OF ACTION BELOW

This Court's articulated standards for granting a writ of certiorari require that a conflict exist either between this Court and a Court of Appeals, or as between Courts of Appeals, and that resolution of the conflict will be dispositive of the action below. The mere allegation of a conflict is not in and of itself a sufficient basis for granting a writ of certiorari. "While this court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts . . .

is judicial, not simply administrative or managerial." The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). It is not a proper exercise of this Court's discretionary jurisdiction to pass upon a conflict when to do so would have no impact on the ultimate outcome of the case below. See, e.g. Monrosa, supra.

Petitioner is asking this Court to determine whether he was required to prove reasonable or justified reliance upon the alleged misrepresentations and omissions in the context of a Rule 10b-5 action. Since the lower courts found that Petitioner had failed to prove each and every other element necessary to state a cause of action under Rule 10b-5 the determination sought by Petitioner before this Court would not change the ultimate outcome reached below.

Thus, a grant of a writ of certiorari is inappropriate. See Monrosa, supra.

II. THE QUESTIONS PRESENTED DO NOT RAISE IMPORTANT QUESTIONS OF FEDERAL LAW

a. The Petition Primarily Presents Questions of Fact.

This Court has traditionally refused to review the factual findings of a District Court which have received the affirmance of the appropriate Court of Appeals. See, e.g. Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635 (1967) ("[this Court] 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'")

A cursory review of the Petition and Questions Presented herein shows that the Questions Presented regarding "reasonable reliance" and "materiality" raise, at best,

mixed questions of law and fact involving statutory standards which have meaning only in their application to the particular facts of this case. See, TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450-451 (1976). As has been recognized, this Court "is not the place to review a conflict of evidence . . . [this rule has] special applicability to cases where, as here, a statutory standard . . . can have meaning only in its application to the particular facts of a particular case." NLRB v. American Nat. Ins. Co., 343 U.S. 395, 410 (1952).

Accordingly, a grant of a writ of certiorari is clearly inappropriate and unwarranted in this case.

b. The Petition Raises Issues Not Raised or Addressed by the Courts Below in the Manner Asserted by Petitioner.

A writ of certiorari is not appropriate to address a question or issue which

was "not properly raised, litigated or passed upon below." McCullough v. Kammerer Corp., 323 U.S. 327, 328 (1945).

Petitioner asserts that the lower courts' determination that he unjustifiably relied upon the alleged misrepresentations and omissions of Hutton was based upon Kennedy v. Josephthal & Co. Inc., 814 F.2d 798 (1st Cir. 1987) (Pet. 21). To the extent the District Court found the proofs lacking on the issue of justifiable reliance, it did so on the authority of Zobrist v. Coal-X, Inc., 708 F.2d 1511 (10th Cir. 1983), cited in Platsis v. Hutton (Pet. 72a). Indeed, the appellate decision in Kennedy v. Josephthal had not been rendered when the District Court made its findings. To the extent the Platsis Court of Appeals relied on the appellate decision in Kennedy v. Josephthal, it appears to be

for the purpose of determining the proper method for calculating the statutes of limitations.

More particularly, the Platsis District Court relied on the Kennedy v. Josephthal lower court opinion only in the context of Petitioner's claim asserted pursuant to Section 12(2) of the Securities Act of 1933. Based on Kennedy v. Josephthal, the District Court found that Petitioner was put on inquiry notice of the alleged fraud more than one year prior to the filing of his action, and, as a result, his Section 12(2) cause of action was time barred. The Platsis trial court's opinion makes no reference to Kennedy v. Josephthal in arriving at its opinion that Petitioner failed to prove justifiable reliance under Rule 10b-5.

The Court of Appeals for the Sixth Circuit affirmed the trial court's Findings

of Fact noting that Kennedy v. Josephthal, relied upon by the District Court, had since been affirmed. It appears that the Court of Appeals' reference to Kennedy v. Josephthal was merely to reaffirm its importance in the context in which it was originally invoked by the District Court.

Petitioner is asking this Court to reexamine the lower courts' application of the standard for proving justifiable reliance under Rule 10b-5 as set forth in Kennedy v. Josephthal when the lower courts did not refer to Kennedy v. Josephthal in connection with the reliance issue. Petitioner cannot assume that the Court of Appeals intended to adopt a broader application of Kennedy v. Josephthal than its application by the District Court.

A writ of certiorari is not proper in this instance where the issue raised was

neither discussed nor litigated before the District Court or the Court of Appeals.

III. NO CONFLICT EXISTS WHICH SUPPORTS A GRANT OF A WRIT OF CERTIORARI

Petitioner asserts that the conclusion reached by the lower courts that Petitioner was required to prove he reasonably or justifiably relied upon the alleged misrepresentations and omissions of Hutton conflicts with this Court's decisions in Bateman Eichler, Hill Richards, Inc. v. Berner, 105 S. Ct. 2622, 472 U.S. 299 (1985); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); and Affiliated Ute Citizens v. United States, 406 U.S. 128, 153, 154 (1972). Petitioner also asserts a conflict between the lower courts' opinions in Platsis v. Hutton and Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981), cert. denied. 459 U.S. 1102 (1983). There are no conflicts.

a. Affiliated Ute Citizens v. United States

In Affiliated Ute this Court held that in a case involving primarily a failure to disclose material information (material omissions) a plaintiff asserting a Rule 10b-5 cause of action need not offer positive proof of reliance but that reliance may be presumed. Affiliated Ute, 406 U.S. at 153; Shores, supra, 647 F.2d 468. Affiliated Ute does not, however, eliminate reliance as an element of a plaintiff's claim. Id.

Here, unlike Affiliated Ute, Petitioner's complaint alleged both misrepresentations and omissions and therefore the Affiliated Ute "presumption" of reliance is inapplicable. See, e.g. Cavalier Carpets, Inc. v. Caylor, 746 F.2d 749 (11th Cir. 1984); Wilson v. Comtech Telecommunications Corp., 648 F.2d 88 (2d Cir. 1981); and

Vervaecke v. Chiles, Hieder & Co., Inc., 578 F.2d 713 (8th Cir. 1978). Moreover, the presumption, if available, is rebuttable--a defendant can show, inter alia, that the plaintiff did not rely on the defendant's duty to disclose. See, e.g., Shores, supra, 647 F.2d at 468. As Chief Judge Hillman found, Petitioner knew of the omitted information but invested anyway. (Pet. 76a). Hence, he did not rely on Hutton's duty to disclose or on the availability of the omitted information. To the extent reliance may have been properly presumed, Petitioner's trial testimony rebutted that presumption. Clearly, the Court of Appeals' decision affirming the District Court is not in conflict with Affiliated Ute.

b. Ernst & Ernst v. Hochfelder

Petitioner's assertion that the decision of the Court of Appeals conflicts with Hochfelder, supra, is without merit. Petitioner does not refer to or discuss the Hochfelder decision except for the initial reference to the case in the Petition on page 23.

c. Bateman Eichler, Hill Richards, Inc. v. Berner

Petitioner contends that this Court's decision in Berner, supra, held that common law defenses are inappropriate in securities actions. Petitioner misinterprets this Court's statements in Berner. In Berner this Court held only that common law defenses may be inappropriate in actions arising under the securities laws where their application would "significantly interfere with the effective enforcement of the securities

laws and protection of the investment public;" Berner, 105 S. Ct. at 2629. To the extent the District Court applied common law defenses, this application is wholly consistent with Berner.

d. Shores v. Sklar

Having found that Petitioner's tax shelters were purchased by way of "face-to-face" transactions the District Court held that the fraud-on-the-market theory of recovery was inapplicable to the type of market in which Petitioner had purchased his limited partnership interests. Petitioner claims this was error.

In effect, Petitioner is asserting a conflict between the District Court's Findings and the holding of the Court of Appeals for the Fifth Circuit in Shores v. Sklar, supra. In Shores, the Court of Appeals held, inter alia, that in order to

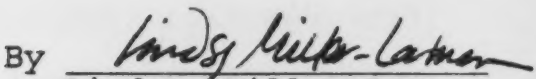
recover under a fraud-on-the-market theory for newly issued securities, Petitioner must establish that the securities would not have been marketable but for the fraud. Id., 647 F.2d at 469-70. The District Court specifically found that Petitioner failed to prove that the securities litigated herein were unmarketable. (Pet. 80a-81a) Petitioner's lengthy discourse as to how the District Court erred in finding that the limited partnership interests were economically viable relates only to the correctness of the Findings of Fact reached by the District Court rather than a conflict with Shores.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Dated: March 1, 1988

Respectfully submitted,

By 

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